

GAHC010157572024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./934/2024

MD. HABIBUR @ HABIBULAH RAHMAN
S/O LATE HAJIBUULAH
VILL- KAIBARTRA DOLONI GAON
P.S. DIMOW
DIST. SIVASAGAR, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE PP, ASSAM

2:SMTI. BUDUNI MURARI
W/O LT. BABU MURARI
VILL- KAIBARTRA DOLONI GAON
P.S. DIMOW
DIST. SIVSAGAR
ASSA

Advocate for the Petitioner : MR. A AHMED, MR A AHMED,U U KHAN

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA

ORDER

Date : 08.08.2024

Heard Mr. A. Ahmed, the learned counsel appearing for the petitioner as

well as Mr. B. Sarma, the learned counsel appearing for the State of Assam.

2. This is an application under section 528 of BNSS, 2023 read with Article 227 of the Constitution of India challenging the impugned order dated 29.07.2024 passed by the learned Additional Sessions Judge, Sivasagar in Sessions Case No. 131(S-S)/2018.

3. I have considered the submissions made by Mr. Ahmed. I have also gone through the impugned order.

4. The view of the learned trial court that the prayer of the petitioner that DNA test should be done to ascertain the paternity of the child is a delaying tactics, is not applicable in the eye of law.

5. Therefore, the impugned order refusing to hold the DNA test is set aside.

6. Moreover, the learned trial court seems to have hurriedly passed the impugned order issuing the non-bailable warrant of arrest against the petitioner. The said order is also set aside. The petitioner shall be allowed to remain on previous bail.

7. The case is remanded to the learned trial court. The court shall consider the prayer for DNA test of the child. The trial court shall be guided by the paragraphs 28, 34 and 35 of the judgment of this Court that was delivered in Crl. Appeal No. 73/2023.

8. For the sake of convenience, the said paragraphs are quoted hereunder :

“28. The above cases show that there is no bar or restriction in having a DNA profiling of an accused in a case of rape. In the present case, not only is there an allegation of rape against the appellant, but the appellant has been accused of being the father of the child born due to the rape

inflicted by the appellant. It is quite clear that DNA profiling of the appellant could prove whether the appellant was the father of the child born to the victim. As Section 53A Cr.PC allows for examination of a person accused of rape through DNA profiling on the request of a Police Officer not below the rank of Sub-Inspector, we do not find any bar or restriction for this Court to pass a direction for DNA profiling of the appellant, which would prove whether the appellant was the father of the child and thus further prove the question whether any rape had been committed on the victim by the appellant.

34. A perusal of the orders passed by the Supreme Court clearly go to show that DNA test/profiling is useful and helpful in coming to a decision with regard to identifying the perpetrator of a crime. The Supreme Court has in many cases as referred to above, supported the use of DNA test/profiling. However, it is only in respect of civil cases where the paternity of a child is in dispute between the married couples that the Hon'ble Supreme Court has given words of caution that DNA test/profiling should not be done at the drop of a hat, in view of Section 112 of the Evidence Act. As stated in the earlier paragraphs, the Supreme Court in the case of Sandeep Vs. State of U.P. (supra) has accepted the confirmation that the accused therein was the father of the unborn child, who had died during the murder of a pregnant woman, determined on the basis of a DNA test. In the present case, the victim has accused the appellant of raping her and making her pregnant. In that view of the matter, we are of the view that the DNA test/profiling would conclusively prove whether the appellant had fathered the child and whether he had raped the victim, as he has denied raping her.

35. In view of the reasons stated above, we are of the view that additional evidence is required to be taken in terms of Section 391 Cr.P.C, as DNA test of the appellant and the child born to the victim, would conclusively prove whether the child has been fathered by the appellant and whether the appellant was the perpetrator of the rape committed on the victim. Accordingly, we direct the learned Trial Court to take additional evidence under Section 391 Cr.PC, by taking steps for ensuring that a DNA test/profiling of the appellant and the child of the victim alleged to have been fathered by the appellant, is undertaken, after taking the samples from the appellant and the child in the presence of the learned Judge of the learned Trial Court. In this regard, necessary directions may be issued by the learned Trial Court to the Superintendent of the concerned Jail to produce the appellant and also to the victim to produce the child. The learned Trial Court shall ensure all precautions are taken at the time of taking of samples from the above persons and making sure the samples are not compromised in any manner. The learned Trial Court shall also ensure that the persons/institution which is going to conduct the DNA test/profiling takes all possible precautions so that the entire testing procedure is not compromised in any manner. The entire exercise should be conducted at the earliest and preferably within a period of 2 (two) months from the date of receipt of a copy of this order.

9. With the aforesaid direction, the criminal petition stands disposed of.

JUDGE

Comparing Assistant